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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 1055

G. F. HOWARD, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

G. F. HOWARD, *Petitioner.*

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PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

To the Honorable the Supreme Court of the United States:

The petition of G. F. Howard respectfully prays for a Writ of Certiorari to the Supreme Court to review the decision of the Circuit Court of Appeals for the Eighth Circuit, rendered January 8, 1945 — rehearing denied February 8, 1945 — Stay of mandate February 16 to March 16, 1945.

The opinion sought to be reviewed is G. F. Howard v. Chicago, Burlington & Quincy Railroad Company, a corporation, in the Record, pages 1 to 58.

The Court has jurisdiction to review said decision under Section 240 of the Judicial Code, Section 347a.

Statute involved Railway Labor Act of 1926, as Amended June 21, 1934; 45 U. S. C. A., Section 151 et seq.; 48 Stat. 1185; The Johnson Act of May 14, 1934, 48 Stat. 775; Statutory Definition—Original Jurisdiction—of District Courts of the United States, 28 U. S. Code, Section 41(8), being Section 24(8) of the Judicial Code, 28 U. S. C. A., Section 41(8).

Railroad Retirement Act of August 29, 1935, C. 812, 49 Stat. 967, as amended June 21, 1937, C. 382, part 1, Section 1, 50 Stat. 307, 45 U. S. C. A., Section 228a et seq., Art. 1, Section 8, Cl. 3, Art. VI, Art. 1, Section 10, Fifth and Seventh Amendments.

The cause has arisen due to a violation of the Railway Labor Act of 1926 by the defendant's refusal to set up a board to settle labor disputes as provided by Section 3 of the Act, R. 6, par. 12. See Order R. Telegraphers v. Railway E. Agency, 320 U. S. ——, 64 S. Ct. 586, par. 4. We hold that the failure of the carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective agreement in force, and at page 583, par. 9, the theory of statute of limitation is that, even when one has a just claim, it is unjust not to put the adversary on notice to defend within limitation period, and that right to be free of stale claims if time comes to prevail over right to prosecute them. R. 5, R. 7, par. 8-12-14.

And R. 3, par, 3, The Order of Railroad Telegraphers is a dominated union. See 308 U. S. ——, 60 S. Ct. 208, par. 6, 7, i. e. (N. L. R. B. v. Newport News & D. D. Co., 308 U. S. ——, 60 S. Ct. 208.)

The law provides that an employe organization shall be free from interference by the employer. Section 1, Railway Labor Act, subd. Sections 1, 6, Section 2, subd. 2, 3, 4, 6, 7, 9, 45 U. S. C. A., Sections 151 and 152. Steele v. Louisville R. Co., 323 U. S. ——, 65 S. Ct. 226, par. 15. The right of a member of a craft or class not to be discriminated against

by a bargaining representative chosen under the Railway Labor Act is a federal right implied from the act of the policy which it has adopted. See R. 6, par. 12, 13a.

Questions Presented.

1. R. 48, Fol. 49—Case handled and decided by lower courts under the common, or State Law, non-federal ground. Should their judgments be reversed? R. 2, par. 1.

2. R. 6(10), 19(10), 24(2), R. 20, 21, Exhibit E. Should the judgment of the District Court of the Seventeenth Judicial District of the State of Kansas, County of Decatur, be set aside and held for naught?

Reasons Relied on for Allowance for Writ of Certiorari.

1. The amendment of the Railway Labor Act, June 21, 1934, and the Johnson Act, 48 Stat., Section 775 (1934), deprived the District Court of Decatur County (Seventeenth Judicial District), of jurisdiction of the subject matter, and the case was not tried by consent. The court took jurisdiction on the grounds that the case was filed January 25, 1934, about five months before the Act was amended.

2. Plaintiff was deprived of his constitutional rights under Art. VI., i. e. This Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Under Chicott C. C. D. D. v. Baxter S. Bank, 308 U. S. ——, 60 S. Ct. 320, par. 3. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon appeal, be reversed for that cause. Id. 10 Wheat., p. 199, 6 L. Ed. 300. The above case evidently was tried under state law, without amending the pleadings, R. 2, par. 1.

That a State court before which a proceeding is completely initiated may, by operation of supreme Federal law, lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal

system. See Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543. Cf. Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461.

Wherefore your petitioner prays that a writ of certiorari may be issued by this court.

G. F. Howard, Petitioner,
G. F. Howard, Appellant.

Oberlin, Kans., March 10, 1945.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION OF COURTS BELOW.

R. 49, par. 8, 67, par. (fol. 71). Opinion 12,934.

Jurisdiction.

Jurisdiction is invoked under Section 240 of the Judicial Code (28 U. S. C. A. 347a).

Petitioner claims that he has been deprived of his rights existing under Article VI, Constitution of the United States, and Laws of the United States, i. e., Railway Labor Act of 1934, and Judiciary Act, Sec. 24(8), 28 U. S. Code, Sec. 41(8), U. S. C. A., Title 28, Sec. 41(8).

The asserted federal right has been denied and the sufficiency of the grounds of denial are for this Court to decide.

Tunstall v. Brotherhood of L. F. No. 76, et al., 323 U. S. ——, 65 S. Ct. 237, par. 3, i. e.

We hold, as in the Steel case, that the bill of complaint states a cause of action entitling plaintiff to relief, non-federal ground, reversed.

Statement of Facts.

R. 3, par. 3. Plaintiff was employed by the defendant on August 1, 1899, at the age of sixteen years, remained continuously in the service of defendant until October 5, 1932, when plaintiff was dismissed upon a trumpedup charge, that was supposed to have happened in McCook, Nebraska, division headquarters of the defendant, on the evening of September 9, 1932, while plaintiff was off duty, and one hour and fifteen minutes late to work the morning of September 10, 1932. During that period of thirty-three years, two months and five days, plaintiff had no entries upon his service record, as to demerit marks, or otherwise, in other words a clear record for over thirty-three years. The carrier, defendant, nor their business was in no way inconvenienced by the hour and 15 minutes delay, an assistant was in charge and he was capable to handle all work at the station.

Plaintiff was denied a hearing or a transcript of the

evidence, if any was taken, as provided by Rule 30, A. to G. R. 12, Exhibit "B".

See R. 3, par 3. The Order of Railroad Telegraphers, which is an association of defendant's employees. There are twenty divisions on the defendant's line of railroad, there is a local labor representative on each division known as the Local Chairman. The Local Chairmen draw no salary from the Labor Organization, but are employees of the defendant and their only means of support is from that source. Each three years the twenty local chairmen select a general chairman and a general secretary from among their twenty local chairmen; their terms are for three years, unless they are reelected; at the end of the three-year term they return to their former position as employees of the defendant. The General Chairman draws a salary, the same as the General Secretary, from the Labor Organization; the General Chairman's duties are to assist the local chairmen in settling disputes, etc.; the general secretary collects the dues. Their salaries are from $350.00 to $500.00 per month. Should they fail to settle disputes in accordance with defendant's desires and instructions, they of course would not return to their former position as an employee of defendant. The above has been in force since February, 1907, since petitioner has been a member.

The Supreme Court ruled in National L. R. Board v. Pennsylvania G. Lines, 303 U. S. 261 and 272, that a "Company Union" was a bar to true collective bargaining.

SPECIFICATION OF POINTS TO BE RELIED UPON AND TO BE URGED BY PETITIONER.

The petitioner contends:

1. That the Kansas judgment is void and should be set aside and held for naught.

2. The Railway Labor Act as amended June 21, 1934, covers all cases pending and unadjusted. Petitioner's claim should be adjusted as provided by the Act, and petitioner's Labor Agreement with defendant, or damages allowed as per petitioner's prayer.

3. R. 2, par. 1, Jurisdiction of Court, and R. 48, Fol. 49, Conclusions of Law.

If petitioner was denied the right to try his case under the jurisdiction shown it should have been dismissed for want of jurisdiction. Petitioner had no case under state law. See Pirie v. Tvedt, 115 U. S. 43, i. e. Plaintiff may try his case in his own way to a final determination.

4. R. 48 p, 4. Refers to Award of the Third Division, i. e. See R. 27, Exhibit "F", par. 8(c). The merits, therefore, are not open to consideration, and R. 28, par. 8, d, That the Board is without jurisdiction. Claim dismissed. The Referee recognizes that petitioner is an employee within the meaning of the Railway Labor Act of 1934; this entitles petitioner to the benefits thereunder.

Referee Swacker's decision conflicts with Federal Rule 41(b), i. e., last sentence. Dismissal for lack of jurisdiction is not an adjudication on the merits. Therefore cannot be pleaded as a bar in any case by court or Board.

5. R. 45, par. 7. A judgment for plaintiff in the sum of $500 was entered in favor of and with the consent of plaintiff on a general verdict of the jury and special questions submitted to the jury wherein the jury allowed the sum of $500.00 to plaintiff as damages for loss of plaintiff's seniority rights.

a. The above is an erroneous statement, and not the facts in the case. See R. 21, par. 2, Exhibit "E", i. e. And afterwards, to-wit, on this eleventh day of February, 1937, the same being one of the days of said term of said court, said Judge presiding, and the plaintiff being present in person, and the defendant being present by its attorneys as aforesaid, on its motion for a new trial and also its motion for judgment for defendant on the special questions and answers thereto, which motions were filed herein on October 17, 1936, and both of said motions being withdrawn, being asked by the Court the plaintiff personally stated in open court that he had no objections to the entry of judgment on said verdict. Due to the fact that respondent failed to sustain his charges in the suit, petitioner was of the opinion he would be reinstated. See Par. F, R. 12, Exhibit "B".

b. The fact that the special questions were withdrawn on the 11th of February, 1936, the entry of judgment was on the general verdict. The special questions were not consistent with the general verdict, otherwise, there would have been no such motion filed as stated above, which "motions were filed herein on October 17, 1936". Had the questions and answers been consistent with the general verdict no such motion would have been necessary. No judgment whatever was rendered upon the special questions.

c. See R. 15, par. 8, of Exhibit "C", i. e., last sentence, i. e. That he was earning an average wage of about $200.00 per month each year and has sustained loss of wages and earnings in about the sum of $3,000.00 by reason of the wrongful acts and breach of contract by and on the part of the said defendant.

d. Nothing is said about suing for future damages in the petition, from October 5, 1932, to January 25, 1934, almost sixteen months, at $200.00 per month, would be a trifle over three thousand dollars. See R. 15, par. 8, of petitioner's Amended Complaint, and,

6. R. 43, par. 1. Finding of Facts. Petitioner was employed at five stations in Colorado, five in Nebraska and five in Kansas during his railroad career with defendant. Petitioner was at Oberlin, Kansas, from October 30, 1914, until October 5, 1932. Any statement by respondent to the contrary is erroneous. R. 44, par 3. Contract signed October, 1927. This contract agreement superseded another contract of practically the same terms, and there had been a contract agreement since February, 1907, in full effect and force. R. 46, par 10, is answered in paragraph 5 (a) and (b) above. There is no selection of remedies.

(a) Under the Railway Labor Act of 1934, Congress provided the remedy, Sec. 3p of the Act. See Kalb v. Feuerstein, 308 U. S. ——, 60 S. Ct. 364, par. 10. Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to a Commission who might be laymen, and consideration as to

jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress has been exercised as in this Act.

(b) The plenary power was likewise exercised under the Railway Labor Act of 1934, but a "Dominated Union" working under instructions of his employer usually set it aside if it interferes with their ideas, or in any way obstructs what they desire to accomplish.

(c) R. 47, par. 12. The defendant was not a party in any way, etc. (last sentence 48, par. 12). Respondent has representation on the Third Division of the Adjustment Board. Any action started against that division, of course respondent is a party by the representation they have on the board.

(d) The hearing in the District Court of the United States was of five hours' duration, and plaintiff Howard was the only witness. The evidence presented fell far short of sustaining the finding of facts and conclusions of law, including the documentary evidence presented. R. 48 (fol. 49), and R. 43 (fol. 44). Motion to that effect was filed by plaintiff, which was overruled by the court.

(e) R. 9, par. 16. Last sentence, i. e. Plaintiff has at no time agreed to a rescission of the contract. Petitioner's contract is a part of the Railway Labor Act of 1934, and as long as petitioner pays his dues it is a continuous contract, and petitioner holds his employment status during a labor dispute. See American Mfg. Co. v. National L. R. Board, 309 U. S. 629; N. L. R. B. v. Good Coal Co., 110 F. (2d) 501, 6th Cir.

R. 37, par. (fol. 38-38A).

7. R. 25 (fol. 25). Award 606, Adjustment Board. Defendant filed May 23, 1944, what was supposed to be the certified record as filed before the Board. There was no opportunity to examine or check the contents, consisting of about 75 to 100 pages. On examination in the Clerk's office the next day, it developed 49 pages of plaintiff's reply in Award 606 had been omitted. See Treineis v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 50, par. 12, 13, i. e. Con-

clusions of a court of general jurisdiction are assailable collaterally for fraud or lack of jurisdiction.

8. R. 44, par. 4 and R. 20 "E". On October 5th, 1932, plaintiff was discharged by defendant upon the grounds that he had violated the defendant's rule, etc. See United States v. Moser, 266 U. S. 236, 242, 45 S. Ct. 66, 67, i. e.

But a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action. Reed v. Allen, 286 U. S. 191, 201, 52 S. Ct. 532, 534, i. e.

> "* * * a judgment not set aside on appeal or otherwise is equally effective as an estoppel upon the points decided, whether the judgment be right or wrong."

9. System Fed. No. 59 v. Louisiana R. Co., 119 F. (2d) 509 (5c), par. 5, decided May 12, 1941, i. e.

While collective bargaining agreement provided that no employee should be dismissed or suspended without sufficient cause, and that restitution should be made when action had been taken contrary to the contract was in force, employees coming under it had their tenure and rights governed by its terms, and for action taken contrary thereto they had a right of action to redress their grievances.

ARGUMENT.

An analysis and appraisal of the procedure under the Railway Labor Act as amended June 21, 1934, and the National Labor Relations Act, should be approached through some initial consideration of the purpose of the Acts and their substantive provisions. Procedure of a federal administrative or quasi-judicial agency is a method provided by Congress for the carrying out of a public policy decided upon by Congress. The Congressional policy is set forth as follows. It is hereby declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation

of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. Employees have as clear a right to organize and select their representatives for lawful purposes as the employer has to organize its business and select its officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.

The substantive provisions of the statute prevent practices such as the discriminatory discharge, the company dominated union, the threat of loss of employment for union activity, espionage, et cetera (practices termed by Congress as "unfair labor practices"), and found by Congress, on the basis of experience, so well known, that the Supreme Court said it was a matter of judicial notice to undermine and destroy the right of collective bargaining (301 U. S. 1.).

CONCLUSION.

While the Kansas court did not have jurisdiction on October 15-16, 1936, when the case was tried, due to the fact that the defendant was unable to sustain the charges brought against the plaintiff, plaintiff should have been reinstated at that time, due to the fact he had been denied a hearing as provided by Rule 30(A) of the Agreement. Paragraph F of Rule 30 mades such a provision. R. 14(F).

Petitioner asks that a writ of certiorari be granted and that upon final hearing the judgments of the lower courts be reversed.

Respectfully submitted,

G. F. Howard, *Petitioner.*

Oberlin, Kans., March 10, 1945.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—o—

ELDON MARTIN,
J. W. WEINGARTEN,
W. P. LOOMIS,
Counsel for Respondent.

Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—o—

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 146 F. (2d) 316 and is printed in the record at pages 67-77. The opinion of the United States District Court for the District of Nebraska appears in the record at pages 41-42.

STATEMENT

Petitioner's statement is not only inadequate but much of it is unsupported by the record. Respondent therefore sets forth the facts, as follows:

Petitioner asks damages for an alleged breach of an employment contract as well as reinstatement to his former position, with restoration of seniority rights (R. 2-9). He was formerly employed in Kansas by respondent as an agent-telegrapher (R. 44). On October 5, 1932, petitioner was discharged (a) for violating the rule prohibiting the use of intoxicating liquor, (b) conduct unbecoming an employee occupying a responsible position, and (c) absenting himself from duty without permission (R. 44).

Contrary to petitioner's assertion, an investigation of the grounds for his discharge was held by respondent's superintendent and petitioner was given a transcript of the evidence (R. 44-45). Petitioner's statements to the effect that he "was dismissed upon a trumped-up charge" and that he "had no entries upon his service record, as to demerit marks, or otherwise" (Pet. 5), are unsupported by the record. His statement that he "was denied a hearing or a transcript of the evidence as provided by Rule 30" (Pet. 5-6) is false (R. 44-45).

Petitioner's claims for damages on account of alleged wrongful discharge, for loss of seniority rights, and for restoration to his former position, have been the subject of litigation with respondent in four different tribunals. In January, 1934, he filed suit in the District Court of Decatur County, Kansas, and in February, 1937, obtained a $500 judgment for damages on account of his alleged wrongful discharge and for loss of seniority rights. Respondent prosecuted no appeal but paid the damages and

petitioner accepted the same (R. 45). Thereafter, in September, 1937, the Order of Railroad Telegraphers, of which petitioner was a member, prosecuted the same claim on his behalf before the National Railroad Adjustment Board. That Board denied his claim and dismissed the case on April 7, 1938, on the ground that the Kansas judgment was res adjudicata (R. 46-47). Thereafter, on June 25, 1943, petitioner filed the instant suit in the United States District Court for Nebraska (R. 1) and, after a trial to the Court, a judgment of dismissal was entered June 15, 1944 (R. 41-42). Petitioner appealed from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit and that Court affirmed the District Court's judgment on January 8, 1945 (R. 77-78).

The initial suit filed by petitioner in the Kansas State Court was for all damages, past, present and future, alleged to have resulted from his alleged wrongful discharge on October 5, 1932 (R. 15, 45-46). Respondent paid and petitioner accepted the $500 judgment entered therein by the Kansas Court in February, 1937. Said Kansas judgment not only became res adjudicata of all claims litigated therein, but also of all claims that might have been litigated therein (*Gould v. Evansville and Crawfordsville R. Co.*, 91 U. S. 526; *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371). As the Court of Appeals held, petitioner's cause of action was indivisible (*Howard v. C., B. & Q. R. Co.*, 146 F. (2d) 316, 319; *McIntosh v. Wiggins* (C. C. A. 8), 123 F. (2d) 316; *Snell v. Turner Lumber Co.* (C. C. A. 2), 285 F. 356).

Notwithstanding petitioner's acceptance of the aforesaid judgment, petitioner, through the Order of Railroad Telegraphers, filed a claim with the National Railroad

Adjustment Board in September, 1937, wherein he sought reinstatement to his former position, as well as reimbursement for the alleged wrongful discharge, on account of which the Kansas judgment had been paid by respondent and accepted by petitioner (R. 25, 46). After this second hearing on the same claim, the National Railroad Adjustment Board dismissed petitioner's claim (R. 46) on the ground that petitioner had already been compensated by respondent's payment of the Kansas judgment for any alleged breach of the employment contract and declined to reinstate him in his former position (R. 27, 46, 47).

In addition to all this litigation *with respondent*, petitioner instituted suits in January, 1940, and April, 1941, in the United States District Court for Kansas, for writs of mandamus to compel the National Railroad Adjustment Board to entertain, hear and decide his said claim, on the merits, despite the fact that said Board had already heard and decided the same as above stated. The Kansas District Court dismissed both actions. The United States Circuit Court of Appeals for the Tenth Circuit affirmed the only judgment, from which an appeal was taken (*Howard v. United States ex rel. Alexander, et al.*, 126 F. (2d) 667), and certiorari was denied by this Court (*Howard v. United States ex rel. Alexander, et al.*, 316 U. S. 699). Respondent was not a party to these proceedings (R. 47-48).

Petitioner instituted the instant case more than ten years after he was discharged, and after petitioner's superior officer (respondent's division superintendent), who discharged petitioner, had died (R. 48). In the instant case petitioner seeks reinstatement with full seniority rights, together with damages alleged to have been sus-

tained as a result of his discharge on October 5, 1932 (R. 2-9).

———o—o———

QUESTIONS PRESENTED BY PETITIONER

It is difficult to determine from the petition and supporting brief just what questions petitioner claims are presented, or what reasons he relies on for the issuance of a writ of certiorari, but it is obvious that he has no grounds for the issuance of the writ. Whether or not the judgment of the Kansas Court is res adjudicata of all claims arising out of his alleged wrongful discharge on October 5, 1932, presents no ground for the issuance of the writ. It is not claimed that the judgment of the United States District Court for Nebraska is either contrary to Kansas law or that the affirmance thereof by the United States Circuit Court of Appeals is in conflict with decisions of other Circuit Courts of Appeal, or with the decisions of this Court.

Petitioner's principal contention seems to be that the Kansas State Court—which he selected as the forum for adjudicating his dispute with respondent, wherein he prosecuted his claim to judgment, and which judgment respondent paid and petitioner accepted—had no legal power to act and that its judgment was wholly void.

———o—o———

ARGUMENT

The Kansas State Court, in which petitioner filed his claim for the alleged wrongful discharge (R. 13-15, 45, 46), was a court of general original jurisdiction with power to hear and decide such a claim (Kansas Constitution, Art. 3, Sec. 1; Art. 3, Sec. 6; Kansas General

Statutes, Sec. 20-301; *Manley v. Park,* 62 Kan. 553, 64 Pac. 28, 187 U. S. 547; *Shuster v. Finan,* 19 Kan. 114). Since that Court had jurisdiction of the parties and the subject matter, the $500 judgment entered by it became final when same was paid by respondent and accepted by petitioner.

Petitioner not only accepted the benefit of the Kansas judgment (R. 6, 45), but in the present proceeding he relied upon that judgment to establish the alleged breach of contract (R. 6; see also p. 10, Par. 8, of petitioner's brief herein). A litigant cannot thus select a forum, invoke the jurisdiction of the Court, prosecute his claim to judgment, accept the benefit of the judgment, and thereafter deny the jurisdiction of the Court in which he obtained the judgment (*Wible v. Wible,* 153 Kan. 428, 110 Pac. (2d) 761; *Wilson v. Union Electric Light & Power Co.* (C. C. A. 8), 59 Fed. (2d) 580; *Prichard v. Nelson* (C. C. A. 2), 137 F. (2d) 312).

If it be true, as presently claimed by petitioner, that he had rights under the National Railway Labor Act as well as at common law, this fact did not oust the Kansas Court of jurisdiction of the subject matter. The petitioner was free to select his remedy at common law in the Kansas courts or under the administrative procedure provided in the National Railway Labor Act (*Moore v. Illinois Central R. Co.,* 312 U. S. 630). Having elected to enforce his rights at common law in the Kansas courts, having prosecuted that claim to judgment, and having accepted and retained the fruits of that judgment, he is in no position to claim said judgment was void and seek to relitigate his claim in another forum.

Petitioner has always claimed in all of the tribunals whose jurisdiction he has invoked that the right which

he alleges respondent infringed was founded upon breach of an employment contract on October 5, 1932. The conclusion of the National Railroad Adjustment Board, of the United States District Court for Nebraska, and of the Court of Appeals for the Eighth Circuit, to the effect that the judgment of the Kansas Court is res adjudicata of the claims which petitioner seeks to relitigate here, is clearly supported by the authorities cited in the Court of Appeals' opinion (R. 73-76).

Petitioner's Action Is Barred by the Statute of Limitations

As indicated above, petitioner commenced the instant suit more than ten years after his alleged cause of action accrued on October 5, 1932 (*Baron v. Kurn*, 349 Mo. 1202, 164 S. W. (2d) 310; *Barry v. Detroit Terminal R. Co.*, 307 Mich. 226, 11 N. W. (2d) 867, 869). For breach of a written contract Kansas law provides that action must be brought within five years from the date the action accrues (1935 Kansas General Statutes, Sec. 60-306, First). The same period of limitations is provided in the 1929 Nebraska Compiled Statutes, Sec. 20-205. If petitioner originally had a cause of action and if respondent had not already satisfied the same, the Kansas and Nebraska statutes of limitation would presently be a bar to any prosecution of said alleged cause of action.

No Question Is Presented With Reference to Discrimination Against Petitioner by His Labor Union nor of Any Domination of Said Union by Respondent

Petitioner's claim that this case involves a question of discrimination against him by the Order of Railroad Telegraphers or that said union was dominated or interfered with by respondent is not only untrue but is wholly

unsupported by the record. Petitioner made no such claim in his amended complaint herein (R. 2-9). Indeed, the record herein would support a contrary contention. Petitioner's union filed and prosecuted his alleged claim with the National Railroad Adjustment Board long after petitioner had prosecuted and obtained his judgment on the same claim in the Kansas Court and long after respondent had paid and satisfied said judgment (R. 25-28, 46). Moreover, petitioner's union handled petitioner's claim with respondent's officers before filing the petition with the Railroad Adjustment Board (R. 45).

Findings of Fact and Conclusions of Law

The District Court's findings of fact herein are printed in the Appendix of this brief. It is impossible to give record references to evidence of record in support of each finding, because petitioner has not included in the record the evidence adduced before the District Court. Moreover, petitioner did not, on appeal, assign any error with reference to the sufficiency of the evidence to support the District Court's findings of fact (R. 51, 52).

Immediately following the findings of fact in the Appendix will be found the District Court's conclusions of law. Citations of authority will be found in support of each conclusion.

———o—o———

CONCLUSION

Since petitioner has already litigated his alleged claim for wrongful discharge in the Kansas State Courts, before the National Railroad Adjustment Board, before the United States District Court for Nebraska, before the United States Circuit Court of Appeals, and inasmuch as respondent paid and petitioner accepted the full amount

of the Kansas Court's judgment nearly ten years ago, respondent respectfully submits that the judgment of the Kansas Court is res adjudicata of petitioner's claims; that the judgment to that effect of the District Court and the Circuit Court of Appeals herein is correct; and that petitioner's application for the issuance of writ of certiorari should be denied.

ELDON MARTIN,
J. W. WEINGARTEN,
W. P. LOOMIS,
Counsel for Respondent.

APPENDIX

DISTRICT COURT'S FINDINGS OF FACT (R. 43-48):

1. At the time this action was commenced plaintiff was a citizen and resident of the State of Kansas and ever since has been, and defendant was and ever since has been a resident of the State of Illinois, owning and operating lines of railroad in and through Douglas County, Nebraska. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

2. Plaintiff was first employed by defendant as a student-helper at defendant's station at McDonald, Kansas, on August 1, 1899, by an oral contract of employment which does not appear to have been for any definite or stated length of time or duration. Plaintiff was promoted to telegraph operator in 1900, and to station agent in 1902, and continued to work for defendant from the time of his first employment until October 5th, 1932. From 1913 to October 5th, 1932, plaintiff's employment was as station agent and telegraph operator at defendant's station in Oberlin, Decatur County, Kansas.

3. Since 1907 plaintiff has at all times been a member of the Order of Railroad Telegraphers, which is an association or labor union of employees working as telegraph operators and station agents, among other occupations, (fol. 45) on lines of railroad. The defendant and the Order of Railroad Telegraphers entered into a written agreement or contract on October 1st, 1927, prescribing rules and rates of pay for telegraphers, agents, and certain other employees not material here, and said agreement has been in effect since October 1st, 1927. Plaintiff was not individually a party to said agreement. Said agreement provided that an employee's seniority rights

dated from the last time of entering the service and extended over each division superintendent's district, and in the event of discipline or unjust treatment an employee should have certain hearings and appeals to the officials of the defendant, a letter stating the cause of discipline and a transcript of the evidence taken at the investigation. Said agreement further provided that if the final decision decreed that the charges against an employee were not sustained, his record should be cleared and if dismissed, he should be returned to his former position and paid for all time lost.

4. On October 5th, 1932, plaintiff was discharged by defendant upon the grounds that he had violated the defendant's rule of its operating Department prohibiting the use of intoxicants, conduct unbecoming an employee occupying a responsible position, and absenting himself from duty without permission, on September 9th and 10th, 1932. Plaintiff was given a letter from defendant's division superintendent stating the foregoing grounds for his dismissal and a transcript of the evidence taken at an investigation held by the division superintendent on September 16th, 1932.

5. Subsequent to plaintiff's discharge on October 5th, 1932, plaintiff made various demands and requests personally and through the officers of the Order of Railroad Telegraphers to (verious) officers of defendant for further hearings and for reinstatement in the employment of defendant, which demands and requests were not granted by defendant.

6. Plaintiff was never reinstated in his employment by defendant after his discharge on October 5th, 1932, and has never been in the service of or employed by defendant

since his said discharge, and plaintiff's employment by defendant was finally terminated on that date, and the relationship of master and servant has never existed between defendant and plaintiff since (them).

7. On January 25th, 1934, plaintiff brought an action (fol. 46) in which he was plaintiff and the defendant here was defendant, in the District Court of Decatur County, Kansas, for damages for injury in obtaining other employment, loss of wages and earnings and for injuries to his good name and the pursuit of his occupation and employment resulting from his alleged wrongful discharge on October 5th, 1932, the refusal of defendant to reinstate him in his employment all in alleged violation of the agreement between defendant and the Order of Railroad Telegraphers, and from an alleged conspiracy between certain of defendant's officers to discharge plaintiff. Said action for damages was tried in October, 1936 and on February 11th, 1937, a judgment for plaintiff in the sum of $500.00 was entered in favor of and with the consent of plaintiff, on the general verdict of the jury and special questions submitted to the jury wherein the jury allowed the sum of $500.00 to plaintiff as damages for loss of plaintiff's seniority rights. On February 11th, 1937 the said judgment was paid by defendant and received by plaintiff who discharged said judgment of record, and no appeal was taken from said judgment and it became final.

8. In said action in the District Court of Decatur County, Kansas, the plaintiff treated his contract of employment by defendant as finally terminated and at an end, and sued for all damages both past and future resulting from the alleged breach of plaintiff's contract or contracts of employment and his discharge from his em-

ployment. The District Court of Decatur County, Kansas, had jurisdiction of the parties to and the subject matter of said action wherein the parties were the same and the contracts of employment and alleged breach thereof are the same as in the case at bar.

9. During September, 1937, the Order of Railroad Telegraphers as the representative of plaintiff and on behalf of plaintiff, filed a claim with the Third Division of the National Railroad Adjustment Board under the Railway Labor Act, demanding that the Adjustment Board require defendant to reinstate plaintiff to his position of agent-telegrapher at Oberlin, Kansas, from which he had been discharged on October 5th, 1932 and reimburse him for all monetary loss sustained. Said claim was based upon the alleged wrongful discharge of plaintiff and refusal to reinstate him in alleged violation of plaintiff's contracts of employment, including said agreement between defendant (fol. 47) and the Order of Railroad Telegraphers. Defendant had due notice of said claim and appeared and defended against same. The claims, contentions, evidence and arguments of plaintiff and defendant were fully presented to the Adjustment Board in accordance with its rules. After full hearing of said claim of plaintiff the Third Division of said Board was unable to reach a decision and the National Mediation Board appointed a Referee to sit with said Third Division of the Board on plaintiff's said claim before the Board. The said Referee held further hearing on plaintiff's claim, in which plaintiff and defendant participated, and on April 7th, 1938, said Third (Divisioh) of the Board entered its decision or Award dismissing plaintiff's claim.

10. The said Adjustment Board in its Award dismissing plaintiff's said claim before the Board found that

plaintiff had recovered damages for loss of his seniority rights in the aforesaid action for damages in the District Court of Decatur County, Kansas, and concluded that plaintiff's action in the District Court of Decatur County, Kansas, was indivisible, that plaintiff there had made an election of remedies, recovered judgment which had been satisfied, that his claim before the Board was barred and that plaintiff could not recover for loss of his seniority—that which entitled him to position—and then recover the position also. The said Adjustment Board had jurisdiction of the parties and of the subject matter of the plaintiff's said claim presented to the Board.

11. In May, 1938 plaintiff filed a Motion for Rehearing of his claim with the National Railroad Adjustment Board, which motion was denied by the Board. In November, 1941, plaintiff filed a Notice of, or a Supplemental Petition with said Adjustment Board asking the Board to grant him the same relief as demanded in his claim presented to said Adjustment Board in September, 1937, and which was dismissed by said Board.

12. In January, 1940 plaintiff commenced an action in the nature of mandamus in the District Court of the United States for the District of Kansas, wherein he was plaintiff and the United States on the relation of its District Attorney for Kansas, and the members of the Third Division of the National Railroad Adjustment Board, were defendants. The object and purpose of said action (fol. 48) was to compel the said Adjustment Board to hear and determine the claims of plaintiff against defendant. That action was dismissed by the court in April, 1940. In April, 1941, plaintiff commenced another action in the nature of mandamus in the District Court of the United States for the District of Kansas, wherein he was

plaintiff, and the United States on relation of its District Attorney for Kansas and the members of the Third Division of the National Railroad Adjustment Board, were defendants, the object and purpose of said action being to compel the said Board to hear and determine the claim of plaintiff against defendant for reinstatement to his employment and payment of his monetary loss resulting from his alleged wrongful discharge. Said last mentioned action was by the court dismissed by judgment entered July 10th, 1941. On appeal taken by plaintiff to the United States Circuit Court of Appeals, Tenth Circuit, the said judgment of dismissal was affirmed and certiorari was (thereofter) denied by the United States Supreme Court. The defendant was not a party in any way to the said actions commenced by plaintiff in the District Court of the United States for the District of Kansas.

13. This action was commenced in this Court more than ten years after the discharge of plaintiff by defendant in alleged breach of plaintiff's contracts of employment, and after the death of the division superintendent of defendant who was plaintiff's superior officer and who discharged plaintiff.

DISTRICT COURT'S CONCLUSIONS OF LAW (R. 48-49) WITH CITATIONS OF AUTHORITIES.

(fol. 49):

1. The Court has jurisdiction of the parties and the subject matter of this cause.

2. Plaintiff is without a claim upon which any relief can be granted.

3. The judgment and payment thereof, in plaintiff's action in the District Court of Decatur County, Kansas, is res adjudicata of all the issues, including damages, in this cause and is a bar to plaintiff's claim.

(Baron v. Kurn, 349 Mo. 1202, 164 S. W. (2d) 310; McIntosh v. Wiggins (C. C. A. 8), 123 Fed. (2d) 316; Arnold v. Masonic Country Club, 268 Mich. 430, 256 N. W. 472; Madden v. Smith, 28 Kan. 798; Price v. First National Bank, 62 Kan. 735, 64 Pac. 637; Ransome Concrete Machinery Co. v. Moody (C. C. A. 2), 282 Fed. 29; Snell v. Turner Lumber Co. (C. C. A. 2), 285 Fed. 356; Runyan v. Great Lakes Dredge & Dock Co. (C. C. A. 6), 141 Fed. (2d) 396; Pierce v. Tennessee Coal, Iron & Railroad Co., 173 U. S. 1; James v. Board of Commissioners of Allen County, 44 Ohio St. 226, 6 N. E. 246.)

4. The Award of the Third Division of the National Railroad Adjustment Board dismissing plaintiff's claim before it is final and binding and constitutes a bar to plaintiff's claims in this cause.

(Railway Labor Act, 48 Stat. 1185, Sec. 3, First (m); Title 45, U. S. C. A., Sec. 153, First (m); Berryman v. Pullman Co. (D. C., W. D. Mo.), 48 Fed. Supp. 542; Austin v. Southern Pacific Co., 50 Cal. App. (2d) 292, 123 Pac. (2d) 39; Railroad Yardmasters of North America v. Pittsburgh & L. E. R. Co. (D. C., N. D. Ohio), 39 Fed. Supp. 876.)

5. The prosecution of plaintiff's action in the District Court of Decatur County, Kansas, to a judgment in plaintiff's favor and payment of that judgment to plaintiff, was an election of remedies which is a bar to plaintiff's claims in this cause, and plaintiff is thereby estopped to demand reinstatement to his employment.

(Slaughter v. La Compagnie Francaises Des Cables Telegraphiques (C. C. A. 2), 119 Fed. 588;

Sweet v. Montpelier Sav. Bank & Trust Co., 69 Kan. 641, 77 Pac. 538; Carr v. Arnold, 239 Ill. 37, 87 N. E. 870; Muir v. Morris (C. C. A. 9), 268 Fed. 97; Gentry v. Bearss, 88 Neb. 742, 130 N. W. 428.)

6. Plaintiff is not entitled to have specific performance of his contract of employment in this Court.

(Beatty v. Chicago, Burlington & Quincy R. Co., 49 Wyo. 22, 52 Pac. (2d) 404; Burke v. Union Pacific R. Co. (C. C. A. 10), 129 Fed. (2d) 844; Moore v. Illinois Central R. Co., 312 U. S. 630; Mosshamer, et al., v. Wabash Ry. Co., 221 Mich. 407, 191 N. W. 210; Chambers, et al., v. Davis, et al., 128 Miss. 613, 91 So. 346; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (Cir. Ct., Ohio), 54 Fed. 730; Fiedler, Inc., v. Coast Finance Co., 129 N. J. Eq. 161, 18 Atl. (2d) 268.)

7. Plaintiff's cause of action is barred by the statute of limitations and by laches.

(Moore v. Illinois Central R. Co., 312 U. S. 630; General Statutes, Kansas, 1935, Sec. 60-306, First; Compiled Statutes, Nebraska, Sec. 20-205; Baron v. Kurn, 349 Mo. 1202, 164 S. W. (2d) 310; Barry v. Detroit Terminal R. Co., 307 Mich. 226, 11 N. W. (2d) 867; Atchison, T. & S. F. Ry. Co. v. Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051; Barnhart v. Western Maryland Ry. Co. (C. C. A. 4), 128 Fed. (2d) 709; Kunz v. Colnon (D. C., Kans.), 54 Fed. Supp. 673; Illinois Central R. Co. v. Moore (C. C. A. 5), 112 Fed. (2d) 959; Order of Railroad Telegraphers v. Railway Express Agency, 321 U. S. 342.)

8. The actions commenced and prosecuted by plaintiff in the District Court of the United States for the District of Kansas are not material to any of the issues in this cause.

9. This action should be dismissed at plaintiff's costs and defendant should recover judgment against plaintiff for costs incurred by defendant.

STATE CONSTITUTION, KANSAS, Art. 3, Sec. 1:

> "The judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts, inferior to the supreme court, as may be provided by law; and all courts of record shall have a seal to be used in the authentication of all process."

Art. 3, Sec. 6:

> "The district courts shall have such jurisdiction in their respective districts as may be provided by law."

GENERAL STATUTES, KANSAS, 1935, Sec. 20-301:

> "There shall be in each county organized for judicial purposes a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior courts and tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses."

GENERAL STATUTES, KANSAS, 1935, Sec. 60-306, First:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> *First*: Within five years: An action upon any agreement, contract or promise in writing."

COMPILED STATUTES, NEBRASKA, 1929, Sec. 20-201:

"Civil actions can only be commenced within the time prescribed in this chapter, after the cause of action shall have accrued."

Sec. 20-205:

"Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment."

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 1055

G. F. HOWARD, PETITIONER,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a Corporation, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF OF PETITIONER IN OPPOSITION.

G. F. HOWARD, *Pro se.*

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REPLY BRIEF OF PETITIONER IN OPPOSITION.

Respondent's Brief in Opposition to Brief for Writ of Certiorari, Page 2.

1. See R. 6, par. 12—The Employer had refused to set up a Board to settle labor disputes June 1, 1933, over six years after the Railway Labor Act of 1926 made such a provision, and Petitioner appealed to E. M. Mosier, General Chairman, on September 11, 1934 (eighty days after the amendment June 21, 1934, of the Act of 1926) to handle Petitioner's case with the Adjustment Board, the same was authorized by the General Committee on November 19, 1934, but case was not filed until September 10, 1937. R. 82, last

paragraph, confirms that the Order of Railroad Telegraphers is a dominated union, see Petitioner's Brief for Certiorari, p. 6. Each member of the General Committee is an employee of the defendant, R. 12, Exhibit "B", Rule 30 (A) to (G) makes provisions for settlement of disputes and grievances, but what good is such an agreement unless it can be enforced? See R. 14, par. 5 and 6. A hearing as provided by the agreement had been denied, as well as a transcript of the evidence, if any was taken, and R. 17, par. 3 to 8, Defendant's counter charges, which were decided by a jury, R. 20, Exhibit "E" and R. 5, par. 8. See R. 88, par. 6 (8 lines from top).

a. See Meade v. Smith, 28 Kansas, p. 570. Under our Kansas jurisprudence the jury are triers of facts and their decision upon doubtful or disputed questions is final and conclusive.

b. See J. I. Case Co. v. National L. R. Board, 320 U. S. ....., 64 S. Ct. 579, par. 6, i. e. But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

c. See Cf. H. J. Hines Co. v. National L. R. Board, 311 U. S. 514, 523-526, 61 S. Ct. 320, 324, 325, 326, 85 L. Ed. 309.

2. Under the ruling of John W. Callender, Director of Retirement Claims, of May 12, 1944, which reads as follows: See R. 87.

This will acknowledge receipt of your letter dated May 6, 1944, which reads in part as follows:

> "Would a bona fide reinstatement whether the employee returns to work or not with his seniority restored make him eligible for a pension under the Retirement Act?"

Present regulations of the Retirement Board provide as follows:

> "A bona fide reinstatement with restoration of seniority privileges, with or without pay for time lost, made for the purpose of and in contemplation of return to actual services (irrespective of whether actual service is resumed), operates to maintain the employment relation throughout the breach in service, provided that reinstatement is not a violation of the rights of other employees.
>
> "Participation in the reinstatement by representatives of the other employees, or acquiescence on their part in an actual return to service, shall be conclusive that the reinstatement was not a violation of the rights of such other employees.
>
> Very truly yours,
>
> JOHN W. CALLENDER, Director
> of Retirement Claims."

See R. 6, par. 12, the General Committee authorized Mr. E. M. Mosier to handle Petitioner's claim for reinstatement, and Award 606, April 7, 1938, R. 28.

See Stark v. Wickard, 320 U. S. ....., 64 S. Ct. 559, par. 8, i. e. Where complainant has an interest personal to himself and not possessed by the people generally in the enforcement of the laws, such interest may be adjudicated by the courts under their general powers. See page 569, col. 2, i. e. But where rights of collective bargaining, created by the same Railway Labor Act, containing definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially, 320 U. S. 330, 331, 64 S. Ct. 149, 150, Cf. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. S. Clerks, 281 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034. See R. 62-64, and R. 9, last paragraph.

Respectfully submitted,

G. F. HOWARD, *Petitioner.*

Oberlin, Kansas, April 3, 1945.

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IN THE

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MOTION FOR REHEARING.

G. F. HOWARD, *Pro Se*,
Oberlin, Kansas.

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MOTION FOR REHEARING.

Comes now the petitioner, G. F. Howard, in the above entitled cause and respectfully requests the Court to reconsider petitioner's request for a writ of certiorari which was denied April 23rd, 1945, for the following reasons, to-wit:

R. 86, par. 1, R. 87, par. 3 to 8. On February 17, 1945, petitioner forwarded the following assignment of errors, part of which was omitted in the printed record, i. e.

1. Under Trenies v. Sunshine Mining Co., 308 U. S. 66, 60 S. Ct. 60, par. 12, 13, i. e. Conclusions of a court of

general jurisdiction are assailable for fraud or lack of jurisdiction.

2. The Trial Court was biased against plaintiff Howard and biased in favor of the defendant. A trial by a biased Judge is not in conformity with "due process of law." National L. R. Board v. Ford, 114 F. 2d 905, par. 1, 301 U. S. 292, 294, 57 S. Ct. 724, 81 L. Ed. 1093.

3. The Court erred in striking from the record on or about Nov. 15, 1943, plaintiff's Exhibits B, C, D, F and G on motion of defendant, R. 60-61 and R. 83. Exhibit B contained L. E. Caldwell's deposition of July 30, 1934, pp. 34 to 41; J. H. Aydelott's deposition, p. 30; J. P. Noble's letter, p. 57—Rule 26 (2) and (3), i. e. Deposition may be used if (1) that witness is dead (L. E. Caldwell is dead), (2) that the witness is farther than 100 miles from place of trial (J. H. Aydelott is farther than 100 miles, J. P. Noble farther than 100 miles).

Rule 43 (a), In any case the statute or rule which favors the reception of the evidence governs and shall be presented according to the most convenient method prescribed in any statute or rule to which reference is made. See Lovell M. Co. v. Bindrim, (2d C. 191 4) 219 F. 533, 135 C. C. A. 283.

4. May 5, 1944, plaintiff subpoenaed C. S. Risdon of Red Oak, Iowa, and F. A. Arnold of Hamburg, Iowa, members of the general committee (Pet. of certiorari, p. 6, par. 1).

Risdon sent a doctor's certificate, but kept the $6.80, fee and mileage.

Arnold appeared at 9 A. M., May 22, date of trial. He remained until noon, but was not placed on the witness stand, neither would my lawyer say whether he would be. Arnold went home at noon and did not return. Court adjourned at noon, May 22, R. 37, fol. 38, Pet. for Cert., p. 9, par. (d). The hearing was of five hours duration; Plaintiff Howard was the only witness.

The above witnesses were in a position to testify that plaintiff was dismissed for reasons other than assigned by the employer.

5. R. 61 (fol. 62), Motion for new trial and Exhibit "A" and "B". R. 60, R. 65 and R. 86, fol. 93. Exhibit "A" as filed June 10, 1944, reads as follows: Plaintiff moves the court to make this a part of the record.

Omaha Nebr. May 24, 1944 to Thos. J. Sheehan Jr. I furnished you copies of depositions I wanted filed ten days in advance of the trial as well as much other evidence, which was not presented to the court. The supposed certified record filed by defendant, which was supposed to be the record filed in Award 606 is not a complete copy, Plaintiff's submission, or a material part thereof has been omitted. There was no opportunity to examine the record in court. If you are representing me in good faith, I demand this case be reopened and I be permitted to introduce my competent evidence. And, that the case be tried, and handled to a conclusion under the "Jurisdiction of the Court" as entered upon plaintiff's Amended Complaint, and not under State or General law.

As stated by the Supreme Court in Order of Railroad Telegraphers v. Railway E. Agency, 64 S. Ct. 586, cases under the National L. R. Act also apply under the Railway Labor Act.

No cases be cited as authority in any briefs that may be filed, except cases under the above two Acts and Interstate Commerce Acts.

No state decisions apply in this case.

Signed, G. F. Howard.

I hereby agree to comply with the above.

Signed, Thomas J. Sheehan, Jr.

May 26, 1944.

(Mailed Special Delivery 9 A. M. May 25, 1944.)

6. Defendant's Brief in the Eighth Circuit, Cause No. 12934, i. e. Findings of trial court are presumptively correct, and where the record does not contain all the evidence upon which findings of fact were based the findings will not be questioned on review, R. 43 (fol. 44).

No jury having been demanded. Rule 52 (b) When findings of fact are made in actions tried by the court with-

out a jury, the question of the sufficiency of evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

6(a). DEFENDANT'S BRIEF, PAGE 9, F. EIGHTH CIRCUIT, i. e.

An employee is not entitled to the equitable remedy of specific performance of his contract of employment in the Courts. And page 9 F-1.

Plaintiff's cause of action is controlled by the common law or state law applicable to his contract or employment.

(b) The Railway Labor Act of 1934, Section 2, Eighth, and Section 2, Tenth, i. e. The willful failure of any carrier, its officers, or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraphs of this section shall be a misdemeanor, and upon conviction thereof the carrier or agent offending shall be subject to a fine of $1,000 to $20,000, or imprisonment, etc. See American Fed. of Labor v. National L. R. Board, 60 S. Ct. 301, par. 1, i. e.

(c) The Court of Appeals for the Dist. of Columbia, like the several Circuit Courts of Appeal, is without jurisdiction over original suits conferred on District Courts, Jud. Code Sec. 24, U. S. C. A. Sec. 41, and Smith v. O'Grady, 61 S. Ct. 572, par. 1. The Federal Constitution is the "supreme law of the land" and the obligation to guard and enforce every right secured by that constitution rests on the state courts equally with the federal courts.

(d) The above Constitution and laws were in effect October 13-15, 1936, when plaintiff's case was tried by a state court over defendant's motion to dismiss on the grounds that the court was without jurisdiction. A Constitutional right was involved on October 13, 15, 1936.

7. QUESTIONS PRESENTED FOR THE COURT'S DECISION:

Has a lawyer the right under Rule 16 Pre-Trial Procedure, to bind his client in any way to deprive the client

of his constitutional or statutory rights? There is no question but what the case was tried under state law by consent of the attorneys *without plaintiff's knowledge or consent.* Sheehan knew nothing whatever about the case or the evidence, as he did not discuss the case with plaintiff; all he knew about the case, if he knew anything, was obtained from the defendant in the case, R. 37 (fol. 37).

8. Rule 16, par. 6, provides the court shall make an order which recites the action taken at the conference, the amendments to the pleadings, and agreements made by the parties as to any of the matters considered, and limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

8a. NO ORDER WAS FILED WITH THE RECORD IN THE CASE, AS PLAINTIFF EXAMINED THE RECORD EVERY FEW DAYS. IN ADDITION TO THIS, I ADDRESSED A LETTER TO THE CLERK OF THE COURT SOMETIME LATER INQUIRING ABOUT A PRE-TRIAL HEARING; THE CLERK REPLIED THAT THERE WAS NOTHING IN THE RECORD OF IT.

9. There is no regular court reporter in the District Court at Omaha. The case was first set for April 28, 1944. Mr. Sheehan called Gordon Harmon at 9 A. M., April 28, to be in court as my stenographer at 9:30 A. M. that day. We all reported at 9:30 A. M. at the court room and in a few minutes we were notified that the case had not been set. I received a letter (joint with all attorneys in the case) on April 24, 1944, that the case was set for 9:30 A. M. April 28, 1944. It was later set for May 10, then changed to May 22, 1944.

a. After the case was heard May 22nd and 23rd, 1944, I called on the reporter that took the testimony, supposed he was my employee in the case, and I was notified that he had been employed by the defendant, and should I desire a copy of the testimony, it would require a court order. I never did get a copy, neither would defendant permit me to read a copy. This, I believe, should be investigated.

10. R. 60, par. 2. June 10th, there was a half-hour hearing, plaintiff filed his Exhibit No. 12 in Cause No. 461, District Court, and in the Eighth Circuit, and plaintiff moves the Court for permission to make Exhibit No. 12 a part of this proceedings. Plaintiff was dismissed for union activities as designated in this exhibit.

11. Exhibit "L" filed in the District Court October 23, 1944, and in the Eighth Circuit about January 2, 1945. Plaintiff moves the Court to make this a part of the record in the above cause. Plaintiff was not permitted to file any evidence on the appeal to the Eighth Circuit; as a matter of fact, plaintiff had no voice in the handling. This was a plain case of coercion and intimidation and conflicts with Title 18, Section 51, of the U. S. Code.

Respectfully submitted,

G. F. HOWARD, *Petitioner*,
Oberlin, Kansas.

April 28, 1945.

This is to Certify that I, George F. Howard, have not presented this Petition for Rehearing for any purpose of delay whatsoever, but solely for the reason of calling this court's attention to the matters above set forth, and honestly believing has inadvertently overlooked or misconstrued such matters.

G. F. HOWARD.

EXHIBIT 12, FILED JUNE 10, 1944.

STATEMENT OF FACTS BY G. F. HOWARD.

Plaintiff Howard was dismissed for the same reasons stated in Order Railroad Telegraphers v. Railway Express Agency, 64 S. Ct. 586.

From shortly after world war one up to the time Plaintiff Howard was dismissed shipment of horses from Oberlin, Kansas to Strasburg, Pennsylvania was being made each year.

The Trade Agreement for handling Express by rail agents was ten per cent. Plaintiff Howard had a claim pending since prior to 1928 and since that date, for the difference allowed by the Express Company ($5.00 per car) and the Trade Agreement of ten per cent.

Express charges on a carload, Oberlin to Pennsylvania was $720.00 per car. Agent Howard should been paid $72.00 per car on each shipment, instead the Railway Express Company allowed Agent Howard $5.00 per car and threatened his dismissal if he deducted in excess of $5.00 per car.

IN APRIL, OR ABOUT THAT MONTH, 1931

Plaintiff Howard published in the Railway Telegrapher, the following article:

NOTICE TO COMMISSION EXPRESS AGENTS

TO THE RAILROAD TELEGRAPHER,

APRIL 24th, 1931.

FOR PUBLICATION IN THE TELEGRAPHER.

The March, 1930 issue of the Telegrapher carried an item to all agents working on commission for the Express Company.

SIGN NO INDIVIDUAL CONTRACTS WITH THE EXPRESS COMPANY: If you are asked to sign a contract or working rules and regulations, notify the party making such a request, that you have a committee to represent you with the Company for the purpose of establishing working Rules and Regulations.

On April 24, 1931, Plaintiff Howard submitted the following to the Local Chairman Enlow, to be published in the Telegrapher. It was published a month or two later in the Telegrapher.

I would like to call your attention to the notation by the Route Agent (Traveling Auditor), when he checks your station, at the bottom of his audit sheet wherein he places the following notation, i. e.

Rate of commission ten per cent line and rail, Air five per cent, carload five dollars per car, etc.

This is nothing but an agreement, and they are trying to reduce your commission from ten per cent, to five per cent, in ten years, no telling, seventy-five per cent of the Express will be traveling by air, and all those that sign this agreement will be handling and doing the same work they are now doing, except instead of receiving ten per cent, they will be receiving five per cent.

When the check is made of your station, you should refuse to sign any such statement or agreement, you do not have to sign it.

Another thing, New York are sending their waybills (95%) of them out "blank" receiving office is required to fully make out the waybill.

If New York can send their waybills out blank, why can't we?

In the writer's opinion, this is for the sole purpose of saving money and, cutting off a few extra men that should write those waybills out and place them on the package the same as all other offices.

All waybills that are sent out that way, commission agents should demand an additional five per cent for making the waybill for both ends of the line.

I would like to hear from others.

(Signed) CERTIFICATE No. 129.

P. S. When Plaintiff Howard sent this for publication, I of course was of the opinion that the Order of Railroad

Telegraphers on the C. B. & Q. R. Co. was a bona fide Labor Organization. I did not find out, that it was a Company Dominated Union, until after I was dismissed and called upon them for assistance in the handling of my case. Certificate No. 129 was Plaintiff Howard's membership number. For definition of Company Union, See Pennsylvania G. H. Lines, 303 U. S. 261 and 272, which is a bar to true collective bargaining

EXHIBIT L.

Omaha, Nebr. October 23, 1944.

Miss. Mary A. Mullen, Clerk District Court of the United States, City.

Dear Madam: Your letter October 20th. that certified copies may be had. In answer, I beg to advise that I will submit what I would like certified to the Eighth Circuit Court as a supplemental submission, which does not take the place of what has been submitted but simply adds to it.

Due to the fact that M. L. Donovan secured my signature to an agreement (July 18, 1944) to permit he and J. C. Mullen to handle the case, then did not handle according to agreement did not deprive me of my rights in the case, and I am not bound by such an agreement in the face of Supreme Court ruling under Pirie v. Tvedt, 115 U. S. 43, which reads, i. e. Plaintiff is entitled to prosecute his own case to a final determination in his own way.

Copy of Letter Addressed to M. L. Donovan, July 31, 1944 (Special delivery).

I do not want my case handled on any other than as provided by my Amended Complaint, and as was agreed upon before I employed you.

The Kansas court did not have jurisdiction of the case. District Court of the United States under the Judiciary Act 28 U. S. C. Sec. 41 (8) and (22), has exclusive jurisdiction, the Board has jurisdiction under the Railway Labor Act.

From what you said this morning, you now contend that the Kansas court did have jurisdiction, etc.

I did not employ you under those terms, and I made it very plain how I wanted the case handled, and my

amended complaint is plain enough to designate how I wanted it handled, and the case can not be won on any other terms, that is a foregone conclusion.

Do not undertake to handle it otherwise.

Signed, G. F. Howard.

I followed the above with a similar letter addressed to both the lawyers on Aug. 5, and 15th (special delivery), and I requested Donovan to sign a withdrawal from the case on August 3, and a number of times thereafter, which he refused to do, unless I would sign an agreement to permit him to retain the $500.00 I paid for the handling of the case, and I was repeatedly threatened by suit unless I permitted the lawyers to proceed with the case.

The only reason I permitted their Brief to be used was the Lino Slug Printing Company refused to print my own brief, which was only twenty pages, and the Insurance Companies refused to give a surety bond for $250.00, all goes to show, or appears that there was a general conspiracy to prevent me from appealing this case, and I was given to understand should I file any evidence that the defendant would file sufficient evidence to run the print bill up to $1,000.00.

Under McNulty v. National Mediation Board, 18 F. Supp. 505 — if coercion has been threatened upon the employee by anyone, party to the suit, such coercion, if proved, would defeat equitable relief to such party, and at p. 506, i. e. The Railway company must also enter the court with clean hands before it can invoke the court's equity powers to restrain another, no matter how inequitable that other's conduct may have been.

Everything points to the fact that the Labor Organization has a hand in the case, which is a "dominated union" and they do not like to be exposed.

In case you will not certify what I want filed, I will then file a motion with the Eighth Circuit and see what they will do, if anything. In case nothing can be done, I will ask the Senate Judiciary Committee to eliminate that part of Rule 1 which reads: Federal Rules shall be con-

strued to secure the just, speedy, and inexpensive determination of every action, my attorney fees since June 25, 1943, is $1,025.00 and all I found out was the court did not have jurisdiction. I could of found that out without any attorneys just as well, all I had to do was wait for the decision.

Yours truly,

Signed, G. F. Howard, *Plaintiff*,
10/23/44. Oberlin, Kansas.

Miss Mullen replied Oct. 24, "We are returning all papers for the reason that we can not consistently certify to these matters without a specific order of court directing us to do so.

G. F. Howard.

State of Kansas, County of Decatur, ss.

G. F. Howard, appellant in Cause No. 12934, being duly sworn, deposes and says that the statements regarding the handling of the case above are correct.

Subscribed and sworn to before me, a county clerk within and for the County of Decatur, State of Kansas, Dec. 28, 1944.

John Locy,
(Seal) By Dorothy Ater, Deputy.

My Comm. expires Jan. 13, 1947.

I was in Mr. M. L. Donovan's office two or three times during the fore part of August, 1944, and I heard Mr. Donovan threaten to sue my husband, Mr. Howard, if he did not let he (Donovan) and Mullen proceed with the case. My husband, Mr. Howard, was insisting Donovan and Mullen withdraw from the case, as Donovan had stated that his brief would show that the Decatur County Court (Kansas) did have jurisdiction in October, 1936.

Minnie R. Howard.